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No. 50405-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Torre,

Appellant.

County Superior Court Cause No. 16-1-00970-9

The Honorable Judge Sally F. Olsen

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court improperly commented on the evidence, in violation of Wash. Const. art. IV, §16.
2. The improper judicial comment violated Mr. Torre's right to a jury trial under U.S. Const. Amend. VI and XIV and Wash. Const. art. I, §§21 and 22.
3. The trial judge erred by admitting Ex. 13, a court order he had signed indicating that "Defendant failed to appear for November 3, 2016 hearing."

ISSUE 1: A judge may not comment on the evidence. Did the evidence in this case include an improper judicial comment that conclusively established Mr. Torre's failure to appear for court?

4. Mr. Torre's bail jumping conviction violated due process because the evidence was insufficient for conviction.
5. The State failed to prove that Mr. Torre failed to appear as required.
6. The State failed to prove that Mr. Torre did not appear at 10:30 a.m. on November 3, 2016.

ISSUE 2: Conviction for bail jumping requires proof that the defendant failed to appear "as required." Did the State fail to prove that Mr. Torre failed to appear at 10:30 a.m. on November 3, 2016, where the evidence showed only that he was not present in the courtroom when it was polled at 11:31 a.m.?

7. Mr. Torre's bail jumping conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.
8. The bail jumping conviction violated Mr. Torre's state constitutional right to notice under Wash. Const. art. I, §§3 and 22.
9. The Information was deficient and failed to charge a crime because it omitted two essential elements of bail jumping.

ISSUE 3: A criminal Information must set forth all the essential elements of an offense. Did the Information fail to properly charge bail jumping because it did not allege that Mr. Torre failed to appear "as required," and did not mention the

State's obligation to prove that he had been "held for, charged with, or convicted of" a class B or C felony?

10. The sentencing court failed to properly determine Mr. Torre's offender score and standard range.
11. The sentencing judge erred by sentencing Mr. Torre with an offender score of 12.
12. The court exceeded its authority by adding six points to Mr. Torre's offender score based on his 1993 convictions from the Territory of Guam.
13. The State failed to establish that Mr. Torre's Guam convictions were legally comparable to any Washington felonies in effect at the time of each offense.
14. The trial court improperly engaged in judicial factfinding in violation of Mr. Torre's Sixth and Fourteenth Amendment right to a jury determination beyond a reasonable doubt of every fact that increases the penalty for an offense.

ISSUE 4: An out-of-state conviction cannot add a point to an offender score at sentencing unless it is comparable to a Washington felony. Did the court err by adding six points to Mr. Torre's offender score based on his 1992 convictions from the Territory of Guam?

15. If Mr. Torre's Guam convictions for second-degree criminal sexual conduct are comparable to second-degree assault with sexual motivation in Washington, they should have washed out of his offender score.
16. If Mr. Torre's Guam convictions are comparable to Washington felonies, they score as the same criminal conduct and add only one point to his offender score.

ISSUE 5: Multiple prior convictions score as the same criminal conduct if the offenses occurred at the same time and place against the same victim with a single overall criminal purpose. Did Mr. Torre's six Guam convictions comprise the same criminal conduct, adding at most one point to his offender score?

ISSUE 6: A sentencing court must exercise independent judgment when determining if prior convictions comprise the same criminal conduct. Did the sentencing judge abuse her discretion by failing to consider whether Mr. Torre's Guam convictions comprised the same criminal conduct?

17. If Mr. Torre's sentencing arguments are not available on review, he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
18. Mr. Torre was denied the effective assistance of counsel by his attorney's failure to contest the comparability of his Guam convictions.
19. Mr. Torre was denied the effective assistance of counsel by his attorney's failure to object to the trial court's improper judicial factfinding.
20. Mr. Torre was denied the effective assistance of counsel by his attorney's failure to argue that his Guam convictions for second-degree criminal sexual conduct washed out and should not have contributed to the offender score.
21. Mr. Torre was denied the effective assistance of counsel by his attorney's failure to point out that his Guam convictions comprised the same criminal conduct.

ISSUE 7: Defense counsel provides ineffective assistance by failing to raise a comparability objection when the State presents materials insufficient to establish comparability. Was Mr. Torre deprived of the effective assistance of counsel by his attorney's failure to raise a comparability objection at sentencing?

ISSUE 8: Defense counsel provides ineffective assistance by failing to argue same criminal conduct when multiple prior offenses are "arguably" the same criminal conduct and a sentencing court "could determine" the offenses should score as one point. Did counsel provide ineffective assistance by failing to argue that Mr. Torre's Guam convictions comprised the same criminal conduct?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The State charged Michael Torre with bail jumping.¹ The

Information read:

Defendant, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state or of the requirement to report to a correctional facility for service of sentence, did fail to appear or did fail to surrender for service of sentence in which a Class B or Class C felony has been filed.
CP 105.

At trial, the State's exhibits were offered by the chief clerk, Allison Sonntag, who was not in the courtroom on the day of Mr. Torre's alleged failure to appear. RP (3/27/17) 319-336. The exhibits included the Information, the docket, clerk's minutes, and a bench warrant. Ex. 14a, 6a, 9, 10, 11, 12, 13 (trial). The court's order authorizing a warrant included the language: "Defendant failed to appear for November 3, 2016 hearing." Ex. 13 (trial). This document was sent with the jury when they retired for deliberations.

The clerk testified that according to another clerk's notes, Mr. Torre was not present because the option "no" was circled on the form regarding whether the defendant was present. RP (3/27/17) 334. The

¹ The charge stemmed from an alleged missed court appearance regarding charges of driving under the influence and possession of methamphetamine. Eventually, the State dismissed the drug charge and Mr. Torre plead guilty to the gross misdemeanor. Neither of those charges are at issue in this appeal. Nor is the charge of driving while license suspended in the third degree. RP (5/26/17) 3-8.

State did not offer any evidence that the courtroom or hallway was polled, or that other courtrooms were checked. RP (3/27/17) 319-336. The order directed Mr. Torre to appear at 10:30 am, but the courtroom was not polled until 11:31. Ex. 9, 11 (trial).

The defense sought to admit evidence that Mr. Torre appeared within two or three days and quashed his warrant. RP (3/20/17) 15-21. The trial judge ruled that the evidence would not be relevant and did not allow the defense to offer it. RP (3/20/17) 15-21; RP (3/27/17) 317-318.

The court gave instructions, which included this element for the bail jumping charge: “[t]hat on or about November 3, 2016, the defendant failed to appear before a court.” Court’s Instructions, filed March 28, 2017, Supp. CP.

The jury convicted.² RP (3/28/17) 441-442.

At sentencing, the State alleged 12 prior felony points, half of which were alleged to be from the territory of Guam. RP (5/26/17) 9. The convictions were all in 1992, but the State did not offer Guam’s criminal code from 1992 (or 1993). RP (5/26/17) 9-37; Ex 1-5 (sentencing).

² The jury was unable to reach a verdict on the charges of driving under the influence and possession of methamphetamine. RP (3/28/17) 439-443. By the time the court sentenced Mr. Torre on the bail jumping, the parties had reached an agreed resolution that included dismissal of the drug charge in exchange for a plea to the gross misdemeanor. RP (5/26/17) 3-8.

The prosecutor acknowledged that he could not prove Mr. Torre's release date for the Guam convictions, and thus could not show how the washout rules applied. RP (5/26/17) 24. In his allocution, Mr. Torre indicated that he was released in 2000 and subsequently spent 12 consecutive years in the community. RP (5/26/17) 56.

The defense argued that the proper score was 9, while arguing that the out-of-state convictions were not comparable to in-state offenses. RP (5/26/17) 27-30.

The court found that Guam's offense of criminal sexual conduct one was comparable to Washington's kidnapping statute. RP (5/26/17) 32-33. The court further ruled that the Washington charge of assault 2 with sexual motivation was comparable to Guam's criminal sexual conduct in the second degree. RP (5/26/17) 36-37. The court sentenced Mr. Torre with 12 points. CP 222.

This timely appeal followed. CP 234-235.

ARGUMENT

- I. MR. TORRE'S BAIL JUMPING CONVICTION MUST BE REVERSED BECAUSE AN UNCONSTITUTIONAL JUDICIAL COMMENT CONCLUSIVELY ESTABLISHED AN ESSENTIAL ELEMENT.**
- A. The Court of Appeals should review *de novo* this manifest constitutional error and must reverse unless the record

affirmatively shows that no prejudice could have resulted from the error.

Judicial comments invade a fundamental right, and thus can always be raised for the first time on review. RAP 2.5(a)(3); *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136, 140 (2006), *as corrected* (Feb. 14, 2007) .; *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Alleged constitutional errors are reviewed *de novo*. *Blomstrom v. Tripp*, 189 Wn.2d 379, 389, 402 P.3d 831 (2017).

Judicial comments are presumed prejudicial. *Jackman*, 156 Wn.2d at 743. A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Id.*, at 743, 745. This is a higher standard than normally applied to constitutional errors. *Cf. State v. DeLeon*, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (outlining constitutional standard for harmless error).

B. The trial judge’s improper comment conclusively established that Mr. Torre “failed to appear for November 3, 2016 hearing.”

The Washington constitution provides “Judges shall not charge juries with respect to matters of fact, nor comment thereon...” Wash. Const. art. IV, §16. The prohibition against judicial comments also protects the right to a jury determination of the facts required for conviction and punishment. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22; *see Alleyne v. United States*, 570 U.S. 99, ___, 133 S.

Ct. 2151, 186 L. Ed. 2d 314 (2013) (discussing limits of judicial factfinding); *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010).

Here, the court's instructions required jurors to find "[t]hat on or about November 3, 2016, the defendant failed to appear before a court." Court's Instructions, filed March 28, 2017, Supp. CP. The trial judge admitted an order signed by a judge, indicating that "Defendant failed to appear for November 3, 2016 hearing." Ex. 13 (trial).

This statement from Judge Houser conclusively established an essential element of bail jumping. The admission of this judicial comment violated Mr. Torre's rights under Wash. Const. art. IV §16. *See Jackman*, 156 Wn.2d at 744. It also infringed his state and federal rights to a jury determination of all facts necessary for conviction and punishment. *See Alleyne*, 570 U.S. at ____; *Williams-Walker*, 167 Wn.2d at 895-96.

C. The improper judicial comment requires reversal of Mr. Torre's bail jumping conviction because the record does not affirmatively show an absence of prejudice.

A judicial comment requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Jackman*, 156 Wn.2d at 745. The State does not meet its burden merely because the comment addressed an undisputed element supported by testimony and corroborating evidence. *Id.*

The defendant in *Jackman* was charged with crimes against four minor boys. *Id.*, at 740. The children provided their birth dates in testimony, the State introduced corroborating evidence for three of the four boys, and the defendant did not contest the children's ages at trial. *Id.*, at 740, 743, 745. To link each count with a specific child, each "to-convict" instruction included the minor victim's initials and date of birth. *Id.*, at 740-741.³ The defendant did not object to these instructions. *Id.*, at 741.

Despite the undisputed evidence and the absence of any objection, the Supreme Court reversed. The court found the date-of-birth references improperly commented on the evidence:

[T]he court conveyed the impression that those dates had been proved to be true. Absent the instructions, the jury would have had to consider whether it believed the evidence presented at trial with respect to the victims' birth dates.

Id., at 744.

In *Jackman*, the Supreme Court reversed even though undisputed evidence established each child's date of birth. *Jackman*, 156 Wn.2d at 743, 745. The Supreme Court also noted that the defendant had not "challenged the *fact* of [the boys'] minority." *Id.*, at 745 (emphasis in

³ The operative language for each instruction told jurors that conviction required proof (for example) that the defendant "(1) ...aided, invited, employed, authorized, or caused B.L.E., DOB 04/21/1985 to engage in sexually explicit conduct; [and] (2) That B.L.E., DOB 04/21/1985, was a minor." *Id.*, at 741 n. 3.

original). Despite this, the *Jackman* court found that the State had failed to meet its burden of affirmatively showing that no prejudice could have resulted from the error:

Nevertheless, it is still conceivable that the jury could have determined that the boys were *not* minors at the time of the events, if the court had not specified the birth dates in the jury instructions.

Id., at 745.

Jackman controls here. Just as in *Jackman*, by indicating that Mr. Torre “failed to appear for November 3, 2016 hearing,” the court “conveyed the impression that [Mr. Torre’s failure to appear] had been proved to be true.” *Id.*, at 744. As in *Jackman*, “the fundamental basis” for the charge—Mr. Torre’s non-appearance—was the subject of the judicial comment. *Id.*; Ex. 13 (trial).

The record does not affirmatively show an absence of prejudice. *Id.* Although the defense did not focus on the bail jumping charge at trial, “it is still conceivable that the jury could have” acquitted absent the judicial comment. *Id.*, at 745.

The State produced no eyewitness testimony proving that Mr. Torre failed to appear. The clerk who interpreted the documents for the jury was not in court for the hearing. RP (3/27/17) 335. Furthermore, the court directed him to appear at “10:30 a.m.,” but the courtroom was not polled until 11:31. Ex. 9, 11 (trial).

Finally, the scheduling order directed Mr. Torre to “personally be present at these hearings at Superior Court of Washington, 614 Division Street, Port Orchard.” Ex. 11 (trial). It did not specify the courtroom where the hearing would transpire. The State did not introduce evidence that anyone checked the hallway, a smoking area, or other courtrooms to see if Mr. Torre had appeared at the courthouse as directed by the scheduling order. Ex. 11 (trial).

The judicial comment infringed Mr. Torre’s rights under Wash. Const. art. IV, §16 and his constitutional right to a jury determination of the facts necessary for conviction and punishment. *Id.*; *see Alleyne*, 570 U.S. at ____; *Williams-Walker*, 167 Wn.2d at 895-96. The record does not affirmatively show that no prejudice could have resulted from the error. *Jackman*, 156 Wn.2d at 743, 745. His bail jumping conviction must be reversed and the charge remanded for a new trial. *Id.*

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE BAIL JUMPING BECAUSE THE STATE DID NOT PROVE MR. TORRE FAILED TO APPEAR AT 10:30 A.M. ON HIS HEARING DATE.

Due process requires the State to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). In challenging the sufficiency of

the evidence,⁴ the appellant admits the truth of the State’s evidence and all reasonable inferences that can be drawn from it. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

However, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). To prove even a *prima facie* case, the State’s evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (addressing *prima facie* evidence in the *corpus delicti* context).⁵

To obtain a conviction for bail jumping, the State must prove beyond a reasonable doubt that the accused person, “having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court... fail[ed] to appear... as required.” RCW 9A.76.170 (1).

The State must prove that the accused person “was absent at the time specified on [the] notice.” *State v. Coleman*, 155 Wn. App. 951, 964, 231 P.3d 212 (2010). In *Coleman*, for example, the defendant was directed to appear for a hearing at 9:00 a.m. *Id.*, at 963. The State introduced

⁴ A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3).

⁵ In this context, “innocence” does not mean blamelessness; rather, it relates to the defendant’s culpability for the *charged* crime. *Id.*

evidence showing that the 9:00 a.m. hearing was stricken at an 8:30 a.m. status hearing because the defendant was already on bench warrant status and did not appear at the 8:30 a.m. status hearing. *Id.* This evidence was insufficient to prove that the defendant failed to appear at 9:00 a.m., the time specified in the notice. *Id.*

In this case, as in *Coleman*, the State did not prove that Mr. Torre failed to appear “as required.” RCW 9A.76.170(1). To prove the requirement of a subsequent personal appearance, the State introduced that Mr. Torre was ordered to appear on November 3, 2016, at 10:30 a.m. Ex. 9, 11 (trial); RP (3/27/17) 332-333. To show he failed to appear, the State introduced evidence that the courtroom was polled at 11:31 a.m. on November 3rd, 2016.⁶ Ex. 12 (trial); RP (3/27/17) 334.

This evidence is insufficient to prove that Mr. Torre failed to appear “as required.” RCW 9A.76.170(1); *Id.* As in *Coleman*, even when the evidence is taken in a light most favorable to the prosecution, “nothing

⁶ The clerk who explained this to the jury had not been present in the courtroom and had no personal knowledge regarding what happened on November 3rd. RP (3/27/17) 335. This distinguishes Mr. Torre’s case from *State v. Hart*, 195 Wn. App. 449, 381 P.3d 142, 144 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 480 (2017). In that case, the in-court clerk who prepared the minutes testified that the defendant “did not appear for his September 9 hearing.” *Id.*, at 454, 458. This, together with a minute entry showing that he “failed to appear at that hearing” was held sufficient. *Id.*

before the jury established that [Mr. Torre] was absent at the time specified on his notice.” *Coleman*, 155 Wn. App. at 964.

The State failed to make out a *prima facie* case, because the evidence is consistent with a hypothesis of innocence. *Brockob*, 159 Wn.2d at 329. For example, it is possible that Mr. Torre appeared at 10:30 a.m. “as required,” but was outside the courtroom at 11:31 when the case was called.

The evidence was insufficient to prove that Mr. Torre failed to appear “as required.” *Id.* The bail jumping conviction must be reversed and the charge dismissed with prejudice. *Id.*

III. THE INFORMATION WAS DEFICIENT AND FAILED TO CHARGE THE CRIME OF BAIL JUMPING.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Pittman*, 185 Wn.App. 614, 619, 341 P.3d 1024 (2015). Such a challenge may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). When the challenge comes after a verdict, the reviewing court construes the document liberally. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A reviewing court must determine if the necessary facts appear or can be found by fair construction in the charging document. *Id.* at 162. If the Information is deficient, the court must presume prejudice and reverse. *Id.* at 163.

The Bail Jumping statute reads (in relevant part) as follows:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence *as required* is guilty of bail jumping.

...

(3) Bail jumping is... [a] class C felony if the person was held for, charged with, or convicted of a class B or class C felony.

RCW 9A.76.170.

One of the essential elements of bail jumping “is that the defendant was held for, charged with, or convicted of a particular crime.” *State v. Pope*, 100 Wn. App. 624, 629, 999 P.2d 51 (2000); *see* RCW 9A.76.170(3). In *Pope*, this language was omitted from a jury instruction, requiring reversal of the defendants’ bail jumping convictions.

Another essential element requires the State to prove the defendant failed to appear “as required,” meaning at the time specified by the court. RCW 9A.76.170(1); *Coleman*, 155 Wn. App. at 964. In *Coleman*, a bail jumping conviction was reversed because the prosecution failed to prove the defendant failed to appear “as required.” *Id.*

The Information here failed to allege either of these elements, and thus did not charge a crime. Instead of charging the essential elements of bail jumping, the Information’s operative language reads as follows:

“Defendant, having been released by court order or admitted to bail with

knowledge of the requirement of a subsequent personal appearance before a court of this state or of the requirement to report to a correctional facility for service of sentence, did fail to appear or did fail to surrender for service of sentence in which a Class B or Class C felony has been filed.” CP 105.

The charging language does not make grammatical sense. It appears to be missing words. Furthermore, nothing in the Information indicates the State’s obligation to prove that Mr. Torre was “held for, charged with, or convicted of” a crime. CP 105; *see Pope*, 100 Wn. App. at 629. Nor does it outline the State’s obligation to prove that Mr. Torre failed to appear “as required.” CP 105; RCW 9A.76.170; *Coleman*, 155 Wn. App. at 964.

Even when liberally construed, the Information is deficient. *Zillyette*, 178 Wn.2d at 161-162. Prejudice is presumed. *Id.*, at 163. Mr. Torre’s conviction must be reversed, and the case dismissed without prejudice. *Id.*

IV. THE TRIAL COURT ERRED BY SENTENCING MR. TORRE WITH AN OFFENDER SCORE OF 12.

An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013). Offender score calculations, including questions of comparability, are

reviewed *de novo*. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014) ; *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014).

For sentencing purposes, prior out-of-state convictions are classified according to their Washington equivalents, if any. RCW 9.94A.525 (3). An out-of-state conviction may not be used to increase an offender score unless it is comparable to a Washington felony. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

A. The State failed to prove legal comparability because it did not provide the statutes in effect at the time of the Guam offenses.

To determine whether an out-of-state conviction is legally comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *In re Pers. Restraint Petition of Crawford*, 150 Wn. App. 787, 793–94, 209 P.3d 507 (2009) If the elements are “substantially similar,” the offenses are legally comparable. *State v. Bluford*, 188 Wn.2d 298, 316, 393 P.3d 1219 (2017); *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) .. This permits the sentencing court to classify the offense in the manner “provided by Washington law.” RCW 9.94A.525(3).

Mr. Torre’s Guam convictions do not add to his offender score unless they were comparable to Washington felonies when committed.

Crawford, 150 Wn. App. 787, 793–94. This requires comparison between the elements of each Guam crime with the elements of the potentially comparable Washington crime “as defined on the date the out-of-state crime was committed.” *Id.*

The burden is on the State to prove comparability. *Olsen*, 180 Wn.2d at 472. The prosecutor failed to do so in this case.

The State’s comparability arguments were based on the current Guam and Washington statutes. CP 168-182. The State did not provide the court the statutes in effect in 1992 (the offense date for the Guam convictions).⁷

Nothing in the record shows that the Guam statutes in effect in 1992 were “substantially similar” to their Washington counterparts from that year. *Bluford*, 188 Wn.2d at 316; *Thiefault*, 160 Wn.2d at 415. Because of this, the prosecution did not meet its burden of proving legal comparability. *Olsen*, 180 Wn.2d at 472. Mr. Torre’s sentence must be vacated, and the case remanded for a new sentencing hearing. *Thiefault*, 160 Wn.2d at 420.

⁷ Although the Washington statutes from 1992 are readily available, the corresponding Guam statutes are not.

- B. The sentencing court's improper judicial factfinding violated Mr. Torre's right to due process and to a jury determination of facts used to increase the penalty for his offense.

Determinations of factual comparability implicate due process and the constitutional right to a jury trial. *State v. Irby*, 187 Wn. App. 183, 206, 347 P.3d 1103, 1114 (2015), *review denied*, 184 Wn.2d 1036, 379 P.3d 953 (2016). This is so because any fact (other than the fact of a prior conviction) must be submitted to a jury and proved beyond a reasonable doubt before it may be used to increase the penalty for a crime. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004).

Accordingly, only those facts previously admitted, stipulated to, or found by the trier of fact beyond a reasonable doubt will serve to prove factual comparability. *Irby*, 187 Wn. App. at 207. The *Irby* court improperly stretched this rule by relying on language in the jury's verdict stating, "that he [the defendant] was 'Guilty as charged in the Information.'" *Id.*⁸

This approach does not resolve the *Blakely* problem. A charging document may contain surplusage that is not submitted to the jury: "unless

⁸ The court noted that "[t]he information is the only document available to demonstrate what facts the jury necessarily found proven beyond a reasonable doubt when it found him guilty as charged." *Id.* Considering the Information and verdict together, the *Irby* court found the evidence insufficient to establish comparability. *Id.*

included in the jury instructions, the State is not required to prove nonessential facts in an information.” *State v. Kier*, 164 Wn.2d 798, 808, 194 P.3d 212, 216 (2008). In such cases, the jury’s verdict will not reflect all the facts alleged in the Information. *Id.*

Here, the trial court engaged in improper judicial factfinding to find that two of the six Guam convictions were factually comparable to Washington felonies. RP (5/26/17) 36-37. This violated Mr. Torre’s constitutional rights to a jury determination of facts used to increase the penalty. *Blakely*, 542 U.S. at 301.

The record in Mr. Torre’s case includes even less information than that available in *Irby*. The prosecutor in this case did not provide the jury’s verdicts, and no evidence indicates that the jury found the facts outlined in the Guam Indictment by proof beyond a reasonable doubt. *Cf. Irby*, 187 Wn. App. at 207. By contrast, in *Irby*, the court relied on a verdict form that purported to incorporate the facts charged in the Information. *Id.*

The sentencing judge should not have relied on the *Irby* approach, absent proof that the facts outlined in the Guam Indictment were incorporated into the court’s instructions and found by the jury upon proof beyond a reasonable doubt. *Kier*, 164 Wn.2d at 808. Furthermore, even if *Irby* set forth an acceptable approach, the sentencing court in this case had

no indication that the Guam jurors found Mr. Torre guilty “as charged in the [Indictment].” *Cf. Irby*, 187 Wn. App. at 207.

Mr. Torre’s sentence must be vacated, and the case remanded for a new sentencing hearing. *Thiefault*, 160 Wn.2d at 420.

C. Mr. Torre’s Guam convictions for second-degree criminal sexual conduct should not have been included in the offender score, even if they were comparable to Washington convictions for second-degree assault with sexual motivation.

The State bears the burden of showing by a preponderance of the evidence that a prior conviction adds a point to the accused’s offender score. *Ford*, 137 Wn.2d at 480. Prior convictions for class B felonies⁹ are not included in an offender score if the accused has spent ten consecutive years in the community without conviction. RCW 9.94A.525 (2)(b).

Improper inclusion of “washed out” convictions creates a sentence beyond the court’s statutory authority. *In re Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). Such an error may be raised for the first time on appeal. *Id.*

The prosecutor acknowledged that he could not prove Mr. Torre’s release date for the Guam convictions, and thus could not show how the washout rules applied. RP (5/26/17) 24. In his allocution, Mr. Torre indicated that he was released in 2000, and subsequently spent 12

⁹ Other than sex offenses. RCW 9.94A.525(2)(a).

consecutive years in the community. RP (5/26/17) 56. This requires washout of any Class B felonies that were not sex offenses.¹⁰ RCW 9.94A.525(2)(b).

The court found that the second-degree criminal sexual conduct convictions were comparable to second-degree assault charges with a finding of sexual motivation. RP (5/26/17) 36-37. The prosecutor incorrectly asserted that this made each conviction equivalent to a class A felony, and thus not subject to wash-out rules. CP 154, 155; RP (5/26/17) 25; RCW 9.94A.525(2)(a).

In fact, even with a sexual motivation finding, second-degree assault was a class B felony in 1992. The legislature did not elevate the enhanced offense to a class A felony until 2001. Laws 2001, 2nd Sp. Sess. Ch. 12 §355.

Nor do the convictions qualify as sex offenses under the SRA, even if comparable to a felony assault committed with sexual motivation. CP 155. RCW 9.94A.030(47). The statutory definition of “sex offense” has four subsections, none of which apply to an out-of-state conviction that is comparable to second-degree assault with sexual motivation. RCW 9.94A.030(47).

¹⁰ Class A and sex offense convictions “shall always be included in the offender score.” RCW 9.94A.525(2)(a).

Specifically, the term “sex offense” is defined to include (a) certain felony violations of Washington statutes;¹¹ (b) pre-1976 Washington felony convictions that are equivalent to those listed in the previous section; (c) Washington felonies with a finding of sexual motivation; and “(d) [a]ny federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense *under section (a)* of this subsection.” RCW 9.94A.030(47)(a)-(d).

In other words, an out-of-state conviction does not qualify as a sex offense unless it is comparable to the offenses listed in subsection (a). RCW 9.94A.030(47)(d). If an out-of-state conviction is comparable to an offense in section (c)—a Washington felony with a finding of sexual motivation—it does not qualify as a “sex offense” for scoring purposes. RCW 9.94A.030(47)(c), (d).

The State conceded that Mr. Torre’s two Guam convictions for second-degree criminal sexual conduct are not comparable to an offense under Chapter 9A.44. RP (5/26/17) 18-20, 22-23. Thus, even if they are equivalent to second-degree assault with sexual motivation, they washed out when Mr. Torre spent 12 consecutive years in the community. RP (5/26/17) 56; RCW 9.94A.525(2)(b).

¹¹ Including felony violations of Chapter 9A.44 RCW other than a first conviction for failure to register, incest, or sexual exploitation of a minor. RCW 9.94A.030(47)(a).

Mr. Torre's sentence must be vacated. The case must be remanded for a new sentencing hearing. *Thiefault*, 160 Wn.2d at 420.

- D. The "facts" relied upon by the sentencing court show that Mr. Torre's Guam convictions comprised the same criminal conduct and added (at most) one point to his offender score.

When calculating the offender score, "[t]he current sentencing court shall determine" whether multiple prior offenses "shall be counted as one offense or as separate offenses using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a)." RCW 9.94A.525(5)(a)(i). The phrase "same criminal conduct" is defined to mean "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

The phrase "same criminal intent" does not refer to a crime's *mens rea*. *State v. Phuong*, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013). Instead, courts consider how intimately related the crimes are, the overall criminal objective, and whether one crime furthered the other. *Id.* When objectively viewed, the intent for a "continuing, uninterrupted sequence of conduct" likely remains the same from one crime to the next. *See State v. Porter*, 133 Wn.2d 177, 186, 942 P.2d 974 (1997).

Furthermore, simultaneity is not required for a finding of same criminal conduct. *Id.*, at 183; *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998). Nor is it necessary that all offenses occur at the exact

same location. *State v. Davis*, 174 Wn. App. 623, 644, 300 P.3d 465 (2013).

A sentencing court's same criminal conduct determination is reviewed for an abuse of discretion. *State v. Graciano*, 176 Wn.2d 531, 533, 295 P.3d 219 (2013). A court abuses its discretion by failing to exercise discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Here, when making its comparability determination, the sentencing court relied on "facts" showing that the Guam convictions should have scored as one offense under RCW 9.94A.525(5)(a)(i) and RCW 9.94A.589(1)(a).¹² As set forth in the Indictment (and in the appellate decision summarizing the evidence produced at trial), Mr. Torre abducted a young woman, touched her vagina and breasts, and penetrated her three times. Sentencing Ex. 1; CP 157-159, 164-167; *see People of Territory of Guam v. Torre*, 68 F.3d 1177, 1178 (9th Cir. 1995).¹³

These "facts" show that Mr. Torre's Guam offenses were "intimately related." *Phuong*, 174 Wn. App. at 546 (internal quotation

¹² As argued above, these "facts" were established through improper judicial factfinding in violation of *Blakely*.

¹³ The 9th Circuit found that the offenses did not merge; however, this does not preclude a finding of same criminal conduct under Washington law. *Id.*; *see, e.g., State v. Wilkins*, 200 Wn. App. 794, 403 P.3d 890 (2017) (noting that a same criminal conduct determination is "distinct from the question of whether the two offenses merge" for double jeopardy purposes.)

marks and citation omitted). The six crimes involved the same overall criminal objective, and comprised a continuing uninterrupted sequence of conduct. *Id.*; *Porter*, 133 Wn.2d at 186. The six offenses took place nearly simultaneously, at a single location – the “secluded spot” where the young woman drove Mr. Torre. *Torre*, 68 F.3d at 1178.¹⁴

There is no indication the trial court considered these facts to make the independent determination required by RCW 9.94A.525(5)(a)(i). This failure to exercise discretion requires reversal. *Grayson*, 154 Wn.2d at 342.

Mr. Torre’s sentence must be vacated. The case must be remanded for a new sentencing hearing, with instructions to score the six Guam convictions as (at most) one point under RCW 9.94A.525 (5)(1)(i).

E. If Mr. Torre’s sentencing arguments are not preserved, he was denied the effective assistance of counsel.

An accused person is entitled to the effective assistance of counsel at sentencing. U.S. Const. Amend. VI, XIV; *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). To prevail on an ineffective assistance claim, the appellant must show deficient

¹⁴ The kidnapping offense involved a car ride ending at the secluded spot, and thus occurred (at least in part) at the same place as the other offenses. *Id.* However, if the locus of the kidnapping is taken to be the starting point of the drive rather than the secluded location where it ended, then the kidnapping scores as an additional point. RCW 9.94A.589(1)(a).

performance and prejudice. *Phuong*, 174 Wn. App. at 548. If Mr. Torre's sentencing arguments are not preserved for review, then he was denied the effective assistance of counsel. *Id.*

1. Counsel was ineffective for failing to raise proper comparability objections to the Guam convictions.

Where the State presents materials that are insufficient to establish comparability, a failure to object is unreasonable. *Thiefault*, 160 Wn.2d at 417. In *Thiefault*, defense counsel failed to object to comparability regarding an out-of-state conviction. *Id.*, at 414. Although counsel's failure to object left the record incomplete, the Supreme Court found prejudice and reversed for ineffective assistance. *Id.*, at 417. This was so despite the absence of information showing that a successful objection would have changed the comparability determination. *Id.*

Here, rather than contesting the matter, defense counsel conceded comparability for at least some of the Guam convictions. CP 185; RP (5/26/17) 27-30. Instead of conceding, counsel should have pointed out the State's failure to show substantial similarity between the Guam and Washington statutes at the time of the offense. *Crawford*, 150 Wn. App. at 793–94.

Likewise, counsel should have made this same argument to support his objections on the second-degree criminal sexual conduct charges. RP

(5/26/17) 27-30. In addition, he should have raised a *Blakely* objection when the prosecutor sought to show factual comparability. RP (5/26/17) 27-30.

Counsel's performance was deficient. *Thiefault*, 160 Wn.2d at 417. Furthermore, as in *Thiefault*, Mr. Torre's attorney's deficient performance caused prejudice: "[a]lthough the State may have been able to obtain a continuance and produce the [missing documentation], it is equally as likely that such documentation may not have provided facts sufficient to find the [Guam] and Washington crimes comparable." *Id.*, at 417.

There is a reasonable probability that counsel's deficient performance prejudiced Mr. Torre. *Id.*, at 414, 417. A successful comparability objection would have reduced the offender score from twelve to six, resulting in a standard range of 22-29 months, rather than 51-60 months. Washington State Caseload Forecast Council, 2016 *Washington State Adult Sentencing Guidelines Manual*, p. 228 (2016).

Mr. Torre's sentence must be vacated. The case must be remanded for a new sentencing hearing. *Id.*

2. Defense counsel was ineffective for failing to argue same criminal conduct.

Defense counsel also provided deficient performance by failing to argue same criminal conduct for the Guam convictions. *Phuong*, 174 Wn.

App. at 548; *see also State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 232 (2004). To show prejudice for failure to argue same criminal conduct, an appellant need only show that a sentencing court “could determine” the offenses comprised the same criminal conduct, or that the crimes were “arguably” the same criminal conduct. *Phuong*, 174 Wn. App. at 548; *Saunders*, 120 Wn. App. at 825.

That showing is met here. As outlined above, the crimes were “arguably” the same criminal conduct, and a sentencing court “could determine” that they should have scored only one point. *Phuong*, 174 Wn. App. at 548; *Saunders*, 120 Wn. App. at 825. If defense counsel had argued same criminal conduct at sentencing, there is a reasonable probability the sentencing court would have reduced Mr. Torre’s offender score from twelve to seven. This would have decreased his standard range from 51-60 months to 33-43 months. Washington State Caseload Forecast Council, p. 228.

There is a reasonable probability that counsel’s deficient performance affected the outcome of the sentencing proceeding. *Phuong*, 174 Wn. App. at 548. Confidence in the result is undermined. *Id.*, at 547. Mr. Torre’s sentence must be vacated, and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Torre's bail jumping conviction must be reversed and the charge dismissed with prejudice. In the alternative, the charge must be dismissed without prejudice, or remanded for a new trial.

If the conviction is not reversed, the sentence must be vacated, and the case remanded for resentencing.

Respectfully submitted on December 15, 2017,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 15, 2017.

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive, flowing style.

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